In The United States Court of Appeals
For the Ninth Circuit

VERNON O. TYLER, Appellant, vs. S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation, Appellees.	}	No. 11983
WILLIAM LESLIE KOHL, Appellant, vs. S. BIRCH & SONS CONSTRUCTION COMPANY, a corporation, and MORRISON-KNUDSEN COMPANY, INC., a corporation, Appellees.	}	No. 11984
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UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE JOHN C. BOWEN, *Judge*

REPLY BRIEF OF APPELLANTS

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THE ARGUS PRESS, SEATTLE

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REPLY BRIEF OF APPELLANTS

These appellants have had an opportunity thoroughly to review the reply brief of the appellants Cole and Sessing filed herein. That brief, in our judgment, is comprehensive in its analysis of the problem involved in this appeal and is conclusive of the issues of our appeal as well as in the case of the appeals docketed in those causes. In the interest,

therefore, of economy of time and for the purpose of preserving a precise definition of the issues herein, with consent of such appellants, we hereby adopt their brief and ask that it be considered and applied to the matters and issues involved in our appeal.

While their brief upon the whole covers for the most part the issuable aspects of our appeal, we deem it worth while to discuss with this court the significance and the connotation of the holding in the Eighth Circuit Court of Appeals in the case of *Day & Zimmerman, Inc. v. Reid*, 168 F.(2d) 356, affirming 73 F. Supp. 892. We do so because we undertake to submit to this court that the pattern, factual content and legal issue in that case are identical with the pattern, factual content and legal issue in our own. Both cases, therefore, are necessarily governed by the same principles of law.

Day & Zimmerman v. Reid

The case came to the Court of Appeals for the Eighth Circuit from the Southern District Court of Iowa, and was decided in the Circuit May 25, 1948. We think the identity of the issuable facts and circumstances between that case and the instant appeal may be presented by submitting the following enumeration of factors appearing therein and by applying them with equal force to the context of the instant appeal. The following facts and circumstances, therefore, will be found to characterize the *Reid* case:

(1) It involved a contract on a cost-plus fixed-fee basis between the defendants (present appellees) and the War Department as a contracting party. The

Ordnance Department was designated by the War Department as a supervising agency.

(2) The contract contained amongst others a classification for an assistant storekeeper characterized as "supervisory employment," purporting to be exempt from the coverage of the Fair Labor Standards Act on the assumption that the duties were supervisory, that is, administrative or executive.

(3) The auditor for the War Department constantly on the job approved payrolls at regular intervals. This was pursuant to the contract providing for supervision of all operations by the Ordnance Department with unlimited power and authority to direct the work in all its phases.

(4) The defendant company was reimbursable under the contract for all expenditures approved by the auditor for the War Department.

(5) Plaintiff, though classified as exempt as assistant storekeeper, spent more than 20% of his time at duties of non-exempt employees. By reason of this fact his employment was coverable under the Fair Labor Standards Act, and actually by reason thereof he lost his status of exemption. (Administrative Regulations, 29 C.F.R. V, Sec 541.1, 541.2.) Hence the trial court in its findings and conclusions awarded him a judgment for overtime, to which it found him entitled under the terms of the Fair Labor Standards Act.

(6) The defendant pleaded under the Portal to Portal Act right to exoneration for such admitted liability in alleging that it acted in "good faith in con-

formity with and reliance upon an administrative regulation, order, ruling, approval or interpretation of an agency of the United States," in classifying and paying plaintiff upon the theory that he was exempt.

Before noticing the court's holding and its discussion pursuant thereto, let us now turn to the factual context of the case at bar.

(1) Here too the defendant, a cost-plus fixed-fee contractor, contracted with the War Department as the prime contractor under terms similar, if not identical, to those contained in the *Reid* case (Exhibit 13).

(2) Again here too there was a classification purporting to describe plaintiff's employment as that of a non-manual nature ranging from assistant auditor and auditor (Tyler), senior clerk and timekeeper (Shumate), clerk (Bruner), accountant (Raymond), assistant auditor (Hood), clerk, checker, storekeeper and assistant timekeeper (Forstein), assistant personnel manager (Louis Kin), etc. (R. cause No. 11463, Vol. 1, p. 20-26.) Here too defendant companies assumed the employment so classified was exempt from the Fair Labor Standards Act and this assumption was indulged in even in the face of the knowledge of the terms and provisions of the Fair Labor Standards Act (10 C.F.R. 1944 Supp., Sec. 809.961 (b); see also Comptroller General's decision, Dec. 15, 1943, referred to therein, p. 975; Comptroller General's opinion B-38642). And further in the face of specific information from the War Department that the Wages and Hours Administrator under the Fair Labor Standards Act claimed such em-

ployment subject to the overtime provisions of the Fair Labor Standards Act and was within the jurisdiction of the Wages and Hours Division (see the so-called "*Tait*" letter, Ex. 75, set out in full in our opening brief, p. 20, 21, 22, 23, 24; also reference thereto, Cole and Sessing brief, p. 15, 16).

(3) Here too inspectors for the War Department were constantly on the job, inspected every operation, audited and approved every payroll at regular intervals. This fact appears abundantly throughout the entire record, is undisputed and admitted by all parties (See, for example, R. p. 379).

(4) Here again the representatives and auditors for the War Department and the Corps of Engineers approved all expenditures for reimbursement (R. 269, 270).

(5) Here too the plaintiffs were classified in the original employment contract arrived at prior to their actual employment under job descriptions assuming them to be exempt from the Fair Labor Standards Act. Subsequent to their employment on the job site they were assigned to work and they performed duties other and different from those contained in their job classifications, which duties brought them squarely within the coverage of the overtime provisions of the Fair Labor Standards Act. (See conclusion of law of the court below in cause No. 11643, R. Vol. 1, p. 64, 65; also see *Lassiter v. Guy F. Atkinson Co.*, 162 F.(2d) 774, CCA 1947.)

(6) Subsequent to the judgment of the trial court below in plaintiff's favor, and while the defendants'

appeal in this matter was pending in this Circuit, and subsequent to the argument in this court upon the merits thereof, the defendants, pursuant to the then recently enacted Portal to Portal Act of 1947, likewise lodged the defense that it should be exonerated from the liability established by the trial court's judgment upon the ground that they had acted "in good faith in conformity with and in reliance upon an administrative order, ruling, approval or interpretation of an agency of the United States" in classifying and paying these plaintiffs without regard to and in violation of the Fair Labor Standards Act.

Upon such issues, identical in the two cases, it is interesting to note the disposition thereof by the Eighth Circuit in its decision in the *Reid* case. There that court recognized the distinction between an abstract job classification antecedent to hiring and a job classification subsequent thereto predicated upon duties actually performed. Approval of an antecedent job description by the War Department could not be, the court held, in reliance in good faith or otherwise upon any assurance that the performance of other and different duties than those called for in the job description would be exempt from coverage under the Fair Labor Standards Act. In the absence of any knowledge by the War Department or its agencies of the duties actually performed by the plaintiffs, no approval of a prior job classification could amount to a reliance upon an "administrative order, regulation, ruling, approval or interpretation of an agency of the United States." In order for it to do so, the court clearly said that the approving agency

must necessarily have knowledge of the duties actually performed.

> "It was the intent of the Portal to Portal Act that employees who had an understanding in good faith with an appropriate Government agency that a practice or act was proper under the Fair Labor Standards Act should not be held liable for a violation of the latter act. It certainly was not the intent of the Portal to Portal Act that a mere approval for payment of a payroll submitted to the Government auditors for that purpose should constitute an understanding in good faith between an agency of the Government and the party submitting the payroll that one individual erroneous classification among thousands on that payroll was a proper classification when it was not even shown that any official of the Government knew what the individual erroneously classified was actually doing, and the employer even professes ignorance of the employee's activity."

This consideration obtains with peculiar force in the instant case. *The companies here never submitted to the War Department or any other agency of the Government a statement or description of the duties actually performed by these plaintiffs.* The duties thus performed were established by the evidence and by the judgment of the court below to be at variance with the non-manual supervisory and exempt classifications in the original contract. Both the contractor and the representatives of the War Department ignored the duties actually performed and limited themselves to considering the abstract job classifications in the contract prior to the initiation of any employment. Note the record. Mr. Northcutt testified: (R. 267)

"Q Did you at any time after employment of any of these plaintiffs submit a job description of the tasks or duties performed by any of these plaintiffs to any representative or official of any agency of the United States for the purpose of determining whether they were or were not included or covered under the terms of the Fair Labor Standards Act?

"A No, sir."

Mr. Noble, the contracting officer, testified: (R. 412)

"Q During the life and progress of the construction and contract 7100 and 202, you were never called on, were you, to investigate or determine the particular tasks or duties performed by any of the plaintiffs in this case,—not to be performed, but actually performed, I mean?

"A Was I ever called upon to?

"Q Yes.

"A No."

It is clear in this case, as was true in the *Reid* case, that the War Department never concerned itself with the nature of any of the duties actually performed by any given individual. It limited itself particularly to considering abstract job descriptions theoretically approved long prior to the initiation of any of the construction projects. Note again the record:

"Q Mr. Northcutt, at the time the job descriptions as contained in Exhibit 42 were prepared, what basis did you have for the preparation of such job descriptions?

"A The basis for the preparation of the job descriptions—Pearl — was data already accumulated by the War Department from various sources.

"The Court: In what form, if you know?

"The witness: In the form of mimeographed bulletins and from compilations prepared by each of the interested cost-plus fixed-fee contractors of the War Department in the Aleutians."

It is clear, therefore, that there is no relationship between the original job classification under which each of these appellants was employed, and the duties actually performed by each of these appellants subsequently on the job site. *That which determined liability under the Fair Labor Standards Act was the nature of the duty actually performed.* An abstract or theoretical description in an antecedent classification or job description has nothing whatsoever to do with liability for overtime under the Fair Labor Standards Act. Hence, it is too clear for argument that neither reliance nor good faith upon such abstract job descriptions can measure up to the conditions required under the Portal to Portal Act to exonerate an employer for failure to comply with the Fair Labor Standards Act.

The Portal to Portal Act requires reliance in good faith upon a regulation or ruling of an agency of the Government. It requires a reliance with respect to an "act" violative of the Fair Labor Standards Act, or an "omission" to comply with the Fair Labor Standards Act. The violation or the failure to comply must be predicated upon a ruling of an agency which leads the employer in good faith to believe that the Act does not affect him. Obviously no agency of the United States Government can furnish any assurance to any employer that the Act does not apply

to any given employment unless or until that agency has knowledge of the nature of the employment in question. It is precisely the *nature of the duty actually performed* which determines the applicability or the non-applicability of the Fair Labor Standards Act. Any ruling by an agency in the absence of such knowledge is not such a ruling as is contemplated in Sec. 9 of the Act. Certainly without submitting to any agency the data with respect to the nature of the duties performed so that such agency may pass upon coverage or non-coverage of the Act, no employer can undertake to claim either reliance or good faith. It is to be borne in mind that the Portal to Portal Act does not exonerate an employer, merely for *conformity* alone. It must be more than conformity. It must be conformity *in reliance* with respect to an act or omission and it must be more than conformity and reliance with respect to an act or omission; there must be *good faith*. The reasoning and the holding of the Eighth Circuit in the *Reid* case, therefore, we submit, dispels any argument or assumption of good faith or reliance by the appellees in this case.

CONCLUSION

The defendant companies (appellees here) failed to pay these plaintiff appellants such amounts for overtime as are provided for in the Fair Labor Standards Act. By the simple mechanism of classifying appellants as supervisory, non-manual and exempt, anterior to their employment, appellee companies thereafter proceeded upon the assumption that they would remain exempt regardless of the nature of the duties assigned and actually performed in the course of the employment. By the very fact and by the nature of these work assignments and of the duties performed, appellants became entitled to the coverage of the Fair Labor Standards Act and the overtime payments therein provided. By reason of that fact the trial court below awarded them a judgment. Is that judgment to be set aside, and is the liability of these appellee companies to be exonerated by reason of the special plea and defense afforded them by the Portal-to-Portal Act? That act did not repeal the right of these appellants to earn and receive overtime under the Fair Labor Standards Act. It merely granted the appellee companies an exemption if, by the requisite burden, it could establish reliance with respect to its violation of the Fair Labor Standards Act—with respect to its "act or omission"—in good faith upon a ruling, order or regulation of an agency of the United States. The law did not express a preference or a presumption in favor of exoneration of liability. In fact, it named a series of four conditions which must concurrently be present as a prerequisite to such exoneration.

The company's proof established that it conformed to a contract which it had with the War Department. It did not rely upon an assurance by the War Department that its refusal to pay in accordance with the Fair Labor Standards Act was not an act or omission violative of that act. In fact, it never asked the War Department to determine whether its refusal to pay was or was not in accordance with the Fair Labor Standards Act. It never submitted to the War Department or any other agency a description or enumeration of the duties performed by these appellants. It neglected to take any steps to determine its liability to these appellants under the Fair Labor Standards Act even in the face of definite knowledge communicated to it by the War Department that the Wages and Hours Division administering the Fair Labor Standards Act claimed that act to be applicable to the appellees' business and to the employment in which these appellants were engaged. The appellee companies were not interested in a ruling upon this issue by any agency of the United States, and were totally indifferent as to whether the Fair Labor Standards Act did or did not apply—and well they might be, because, as the War Department advised them, in the event it should develop that the act applied and that these appellees were liable, they were and would be reimbursable to the full extent of such liability. The actual reliance in this case, therefore, upon which appellee companies acted was that of indemnification. At no time did they, as reasonably prudent business men, have any justification for feeling that the Act itself did not apply or that they were

free from its coverage. Neither the reliance nor the good faith contemplated in the Portal-to-Portal Act, therefore, can be predicated on conduct so neutral, indifferent or equivocal. Appellee companies elected to abide the risk involved in their indifference. They must and they should now assume that risk. Under such circumstances Congress never intended the Portal-to-Portal Act to serve as an escape from liability.

Respectfully submitted,

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